CITATION:	*Sangare v Northern Territory of Australia* [2018] NTSC 5
PARTIES:	SANGARE, Souleymane v NORTHERN TERRITORY OF AUSTRALIA
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT exercising Territory jurisdiction
FILE NO:	SCC 75 of 2016 (21531342)
DELIVERED ON:	6 February 2018
DELIVERED AT:	Darwin
HEARING DATE:	17, 27, 28 February and 1 March 2017
JUDGMENT OF:	Grant CJ

CATCHWORDS:

DEFAMATION – STATEMENTS AMOUNTING TO DEFAMATION – JUSTIFICATION – FAIR COMMENT – PRIVILEGE – OTHER DEFENCES

Defendant conceded that imputations defamatory – defendant asserted publication not actuated by malice and attracted protection from liability on the grounds of qualified privilege, honest opinion, justification and contextual proof – no issue estoppel arising from previous determination of the Federal Circuit Court in adverse action claim – even if issue estoppel arose result would be the same – Minister had an interest in having information in relation to the plaintiff's visa application and employment – defamatory imputations were published in the course of giving Minister information on those subjects – conduct of the Departmental employees reasonable in the circumstances – publication not actuated by malice – protected by qualified privilege.

Crown Proceedings Act (NT), s 5
Defamation Act 2006 (NT) s 4, s 5, s 21, s 22, s 23, s 27, s 28
Fair Work Act 2009 (Cth), s 351, s 361
Migration Act (Cth) s 48, s 65
Public Sector Employment and Management Act (NT) s 16, s 33, s 64A

Adam v Ward [1917] AC 309, *Bashford v Information Australia (Newsletters) Pty Ltd* (2004) 218 CLR 366, *Blair & Perpetual Trustee Co Ltd v Curran* (1939) 62 CLR 464, *Board of Bendigo Regional Institute of Technical and Further Education v Barclay* (2012) 248 CLR 500, *Bruton v Estate Agents Licensing Authority* [1996] 2 VR 274, *Construction, Forestry, Mining and Energy Union v BHP Coal Pty Ltd* (2014) 253 CLR 243, *Co-ownership Land Development Pty Ltd v Queensland Estates Pty Ltd* (1973) 47ALJR 519, *Horrocks v Lowe* [1975] AC 135, *Jackson v Magrath* (1947) 75 CLR 293, *Lange v Australian Broadcasting Corp* (1997) 189 CLR 520, *Linsley v Petrie* [1998] 1 VR 427, *Morgan v John Fairfax & Sons Ltd (No 2)* (1991) 23 NSWLR 374, *Murphy v Abi-Saab* (1995) 37 NSWLR 280, *New South Wales Country Press Co-operative Co Ltd v Stewart* (1911) 12 CLR 481, *Ramsay v Pigram* (1968) 118 CLR 271, *Roberts v Bass* (2002) 212 CLR 1, *Stephens v West Australian Newspapers Ltd* (1994) 182 CLR 211, *Webb v Bloch* (1928) 41 CLR 331, referred to.

REPRESENTATION:

Counsel:

Appellant:	In person
Respondents:	T Anderson

Solicitors:

Appellant:	Self-represented
Respondents:	Hunt & Hunt

Judgment category classification:	B
Judgment ID Number:	GRA1801
Number of pages:	59

IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

Sangare v Northern Territory of Australia [2018] NTSC 5
SCC 75 of 2016 (21531342)

BETWEEN:

SOULEYMANE SANGARE
Plaintiff

AND:

NORTHERN TERRITORY OF AUSTRALIA
Defendant

CORAM: GRANT CJ

REASONS FOR JUDGMENT

(Delivered 6 February 2018)

[1] These proceedings for defamation were originally commenced in the Local Court on 25 June 2015. By order dated 6 July 2016, the plaintiff was required to particularise his claim for damages by the close of business on 21 July 2016. In compliance with that order, on 17 July 2016 the plaintiff, who was and is self-represented, filed a document which particularised his claim for damages in the amount of $5 million. That amount exceeded the Local Court's jurisdictional limit in civil claims. As a consequence, on 2 August 2016 the Local Court transferred the proceedings to this court.

[2] That transfer notwithstanding, the matter proceeded in this court on the basis of the pleadings that had been filed in the Local Court.

[3] The plaintiff's claim is pleaded in a document described as a "Proposed Amended Statement of Claims" dated 29 January 2016. That claim was subsequently amended by a document described as a "Proposed Amended Remedy Sought" dated 16 June 2016, by which the claim of $5 million was substituted for the original claim of $100,000.

[4] The defence is pleaded in a Notice of Defence dated 22 February 2016.

The claim

[5] The plaintiff's claim may be summarised as follows.

[6] Between 20 June and 28 August 2014, he was employed as a civil engineer on a temporary basis with the Northern Territory Department of Infrastructure ("the Department"). On 28 August 2014, the Department offered the plaintiff a permanent position on the basis that it would sponsor him under a skilled migration scheme run by the Australian Government. As part of that scheme the plaintiff was required to apply for and secure the appropriate visa.

[7] On 19 November 2014 the plaintiff was advised by the relevant Australian Government agency that his application for a temporary work visa was invalid because he had previously been refused a protection visa on 23 March 2012. On the advice of his lawyer, the

plaintiff sought expressions of support for his visa application from the Northern Territory Minister for Infrastructure ("the Minister"), his local member of the Legislative Assembly and the Mayor of Katherine. The plaintiff alleges that various employees of the Department conspired for the purpose of preparing a false and defamatory communication to the Minister recommending that he not support the plaintiff's visa application. That communication was comprised by a document described as a "Ministerial Briefing" dated 25 November 2014.

[8] The plaintiff alleges specifically that the content of the Ministerial Briefing was fabricated to make it appear that the plaintiff had provided false and misleading information to the Department in relation to his immigration status, and to make it appear that the plaintiff was a dishonest person and of bad character. Although not pleaded expressly, the claim clearly implies that the defamatory communication was made because the plaintiff had drawn attention to defects in works performed by contractors engaged by the Department to perform road construction works, and that those contractors had made complaints concerning his supervision of the contracts.

[9] The plaintiff says that as a consequence of the defamation he was advised by letter dated 10 December 2014 that his employment with the defendant would be terminated with effect from 17 December 2014.

The defence

[10] The defendant admits that it employed the plaintiff as a civil engineer in Katherine from June 2014; that the plaintiff was subsequently offered a two year contract commencing on 6 October 2014; and that the plaintiff's employment was ultimately terminated by letter dated 10 December 2014.

[11] So far as the dealings with the Australian Government are concerned, the defendant says that it nominated the plaintiff for a subclass 457 Temporary Work (Skilled) visa to facilitate his employment with the Department; that the nomination was approved by the relevant Australian Government agency on 7 October 2014; that the plaintiff subsequently made application for the visa; that the application was found to be invalid; and that the plaintiff did not inform the defendant until 24 November 2014 that he had previously applied for and been denied a protection visa.

[12] So far as the dealings with contractors are concerned, the defendant says that the Department's chief executive officer and two senior employees met with the plaintiff in Katherine on 18 November 2014. A purpose of that meeting was to counsel the plaintiff concerning the manner in which he dealt with contractors following a complaint from the principal of a contractor which was at that time engaged by the Department to perform road construction works.

[13] So far as the composition and content of the Ministerial Briefing is concerned, the defendant says that on 24 November 2014 the Department received further information from the plaintiff concerning his immigration status, including a decision of the Refugee Review Tribunal dated 22 October 2012; that the Department's chief executive officer and a number of other Departmental employees conferred to determine whether the plaintiff's request for the Minister's support and intervention with the Australian Government should be supported; that on the basis of that further information it was determined that the Department would no longer support the plaintiff's attempt to obtain a visa which would permit him to continue in employment with the defendant; and that the content of the Ministerial Briefing reflected the reasons for that determination.

[14] The defendant concedes that the Ministerial Briefing was a publication to the Minister, and that it conveyed three defamatory imputations concerning the plaintiff. Those imputations were that:

(a) at the time of his recruitment the plaintiff had not been completely truthful in his communications with the Department's employees concerning his immigration history;

(b) the plaintiff had fabricated evidence to the Refugee Review Tribunal; and

(c) during the course of his employment with the defendant the plaintiff had dealt inappropriately with various public sector employees and private contractors.

[15] While the defendant concedes that the imputations were defamatory, it says that the publication was not actuated by malice and attracted protection from liability on the following grounds:

(a) under s 27 of the *Defamation Act* (NT), or the defence of qualified privilege at general law, on the basis that the Minister had a legitimate interest in information on the work and conduct of the plaintiff, and that the publication was reasonably made in that belief;

(b) under s 28 of the *Defamation Act*, or the defence of honest opinion at general law, on the basis that the opinions concerning the plaintiff's conduct were honestly held on a matter of public interest given his position as a public sector employee, and based on material which was either substantially true or published on the occasion of qualified privilege;

(c) under s 22 of the *Defamation Act*, or the defence of justification at general law, on the basis that the publication was substantially true;

(d) under s 23 of the *Defamation Act*, on the basis that if some of the imputations are found to be justified and some not, the publication caused no greater harm to the reputation of the plaintiff than would have been caused had only the defensible imputations been published; and, or in the alternative

(e) under s 64A of the *Public Sector Employment and Management Act* (NT), on the basis that the publication was made by the Department's chief executive officer in good faith and in the course of his employment.

Findings of fact

[16] I find that the acts, facts, matters and circumstances relevant to the claim are as follow.

[17] The plaintiff is a citizen of Guinea and arrived in Australia on 13 May 2011 under a Belgian passport belonging to his brother. He applied for a protection (Class XA) visa under s 65 of the *Migration Act 1958* (Cth) on 3 June 2011. The delegate of the Minister for Immigration refused that application on 23 March 2012. The plaintiff applied to the Refugee Review Tribunal for a review of that decision. The Refugee Review Tribunal affirmed the decision not to grant the plaintiff a protection visa in a statement of reasons dated 22 October 2012.

[18] As already described, the second defamatory imputation is that the plaintiff had fabricated evidence to the Refugee Review Tribunal. The

defence to the claim includes the contentions that the Departmental employees responsible for drafting the Ministerial Briefing genuinely held that opinion, and on reasonable grounds. For that reason, the content of the Tribunal's decision bears on the determination of the plaintiff's claim. The statement of reasons included the following paragraphs:

> [32] The delegate divided the applicant's migration history into the history as known to the Department, and the history as represented by the applicant. In respect of the history known to the Department, the delegate found that the applicant entered the USA in 2000, overstayed and was subsequently removed. In 2000 the applicant filed an asylum application under his own name. In 2006 the applicant entered into the USA on a business visitor visa using an altered passport and was subsequently arrested as an imposter for the re-entry after removal, and was removed to Guinea. In 2007 the applicant filed a second asylum application in the USA under the name Jules Mansare. The applicant was subsequently found in the USA without a valid visa in 2010 and was arrested for giving false identity details to law enforcement officers. At the end of 2010 the applicant was denied lawful status in the USA by an immigration judge. In March 2011 the applicant was removed from the USA to Paris, France. The applicant arrived in Australia on 13 May 2011 while holding a Belgian passport.
>
> [33] In respect to the applicant's migration history as represented by himself, the applicant claimed to the Department that in 1995 he first entered the USA on a visitor visa. The Applicant also claimed that in 1998 he arrived again in the USA on a student visa. According to the applicant's written application, in 2000 the applicant successfully applied for asylum in the USA. The delegate then goes on to state that in 2003 the applicant was issued a refugee travel document and travelled for a month to Germany, France, Amsterdam and Belgium and then returned to the USA. The delegate then states that in 2004 the applicant was denied a refugee travel document and successfully appealed that decision. The delegate states that the applicant indicated in his application and at interview that he travelled to Africa for one month in 2005 and only went to

Mali. According to the applicant's version of events, in 2005 the applicant lodged an application for permanent residence in the USA, and in December 2010 the applicant left the USA to Guinea. The delegate states that the applicant said at the interview that he was removed from the USA in 2005 as he was the victim of administrative error. The delegate states that the applicant claimed that this error occurred as a result of him appealing an immigration decision, while in the interim having his wife successfully file a petition to have him attached to her refugee visa. As a result, because he was unsuccessful with his appeal, he was removed from the USA.

....

[35] The delegate summarises that he does not accept that the US government provided the Department with falsified records in relation to the applicant. The delegate considered the information received from the US government to be highly credible. The delegate was not satisfied that the applicant had provided the Department with truthful statements regarding his migration history. The delegate concludes that as a result of the applicant's capacity to provide fabricated information to immigration authorities, and as a result of the delegate's inability to ascertain the applicant's true background, the delegate cannot accept the factual basis of the protection claims that the applicant has put forward. The delegate concludes that he does not consider the applicant to be a witness of truth and cannot regard the applicant's account as factual circumstances and accordingly the delegate found the applicant as not having a genuine fear of harm and that there is not a real chance of persecution occurring should he return to Guinea.

....

[118] In determining whether an applicant is entitled to protection in Australia the tribunal must first make findings of fact on the applicant's claims. This may involve an assessment of the applicant's credibility and, in doing so, the Tribunal is aware of the need and importance of being sensitive to the difficulties asylum seekers often face. Accordingly, the Tribunal notes that the benefit of the doubt should be given to asylum seekers who are generally credible, but unable to substantiate all of their claims.

....

[120] The Tribunal found that the applicant was not a reliable witness. The Tribunal found the applicant's evidence to be characterised by inconsistency, exaggeration, and fabrication as is explained in the Tribunal's finding below. The Tribunal finds the applicant embellished his claims. …. The applicant also provided documents which he purports granted him a right to live in the USA for 10 years from 2002 to 2012. However the Tribunal's enquiries with the US Department of Homeland Security, Foreign Liaison Office, through DFAT, reveals the applicant has had two asylum applications in the USA refused and that he was deported from the USA and does not have a right to re-enter and reside in that country. The applicant also conceded that he used a false name as well as someone else's passport to re-enter the United States as well as to travel to and enter Australia. The Tribunal also found the applicant gave selective evidence at the Tribunal hearing, where for example he made no mention of being arrested on 22 December 2010 in the United States for failing to appear, giving law enforcement officers a false name, address and date of birth, et cetera. Based on these, and other finding set out in what follows, the Tribunal finds the applicant is not a witness of truth, and is a person whose claims and sworn oral evidence at best cannot be relied upon, and at worst are fabrication and invention. The adverse information, inconsistencies, and contradictions were put to the applicant pursuant to section 424AA of the Act. The Tribunal found the applicant's comments in response, and his attempted explanations of the adverse information, to be unconvicting. The Tribunal finds that the applicant's responses do not remove in any way the basis for the Tribunal to conclude, as did the delegate, that the applicant has fabricated his evidence, misrepresented the facts, and is a person who has a propensity to tailor and embellish claims to achieve a favourable migration decision.

….

[123] The applicant claimed that there is some irregularity with the USA's handling of his application for asylum. Based on the information cited above which the Tribunal received from the US Department of Homeland Security Foreign Liaison Office, the Tribunal finds that the relevant asylum determining authority in the USA has found, on at least two instances, that the applicant is not a person to be afforded protection as a refugee on the basis of his own claims. The information from the US Department of Homeland Security is that his applications, and his appeals, were refused and dismissed

respectively, and that he was removed or deported twice from the USA. This report is also clear that he does not have a right to re-enter or reside in the USA due to the commission of fraud. In light of this, there is in the Tribunal's view, no room to interpret certain documents provided by the applicant as being genuine. For example, the Tribunal considers the document referenced EAC-03-176-50039 and which the applicant claims grant him asylum or refugee status for a period of 10 years from 2002 to 2012, is not a genuine document in light of the advice given by the US Department of Homeland Security. The Tribunal finds that there is no reliable or credible evidence given by the applicant to suggest that the relevant asylum assessing authority in the USA made a relevant mistake in assessing his application, or that the US Department of Homeland Security made a mistake in providing its report via DFAT to this Tribunal, or that the information provided to the Tribunal is tainted by error. The Tribunal does however accept the applicant's claim that he was not removed to Paris France and that this was an error on the original report provided to the Department. The Tribunal considered the applicant has attempted to explain the refusal of asylum in the USA by claiming that he was refused asylum because he overstayed his student visa, and such things as the US Immigration and Customs Enforcement (ICE) being "out of control". The Tribunal finds these attempted explanations to be inadequate to obfuscate or confuse what actually happened in respect of the applicant's asylum applications in the USA.

….

[126] To conclude on the question of the applicant's claims regarding the USA, the Tribunal accepts as reliable and genuine, the report from the US Department of Homeland Security Foreign Liaison Office, and that the applicant does not have a right to re-enter and reside in the United States, that the applicant has had his claims that he has a well founded fear of persecution in respect of Guinea refused by the relevant assessing authority in the USA. Furthermore, the Tribunals find that the applicant's evidence in respect of his claims relating to his visa status in the United States to be inconsistent and discredited and adding further unreliability to his claims and evidence.

[19] In addition to those matters, the statement of reasons delivered by the Refugee Review Tribunal contained an exhaustive survey of the various materials and accounts concerning the plaintiff's affiliations and political activity in Guinea, and his immigration history in the United States, and various other findings in relation to those matters. During the present hearing the plaintiff continued to take issue with the accuracy of those findings concerning his dealings with the United States immigration authorities and the circumstances of his deportations. That disputation notwithstanding, the plaintiff accepts in general terms that he entered the United States at some time prior to 2000, he overstayed his visa, he was deported, he returned again in 2006 using an altered passport, and after a series of processes he was denied lawful status in 2010 and deported in March 2011.

[20] The plaintiff brought an appeal from the decision of the Refugee Review Tribunal to the Federal Circuit Court. That appeal was unsuccessful. The plaintiff subsequently brought an appeal to the Federal Court, which was also unsuccessful. The plaintiff then sought special leave to appeal to the High Court, which was also refused. As will be seen, the application to the High Court was dismissed on 11 September 2014, after the plaintiff had commenced employment with the Department. The order was authenticated on 15 September 2014. The plaintiff received a copy of that order on 19 September 2014, from

which time he understood he had no further avenue of appeal from the decision of the Refugee Review Tribunal.

[21] On or about 30 June 2014 the plaintiff had commenced employment as a manager of civil roads projects in the Department's Katherine office. He was engaged through an arrangement with a private labour hire company. The engagement was on a temporary basis.

[22] The position was advertised for permanent appointment on 25 July 2014. Four applications were received, including one from the plaintiff. The chairperson of the selection panel was Paul Flanagan, who was the Department's regional director in Katherine. In that capacity, he had been supervising the plaintiff since his commencement with the Department. Julie Cargill was the Department's director of human resources at the material times, and also a member of the selection panel.

[23] The plaintiff was the only applicant shortlisted for consideration. To that point in time Mr Flanagan had been satisfied with the plaintiff's work performance and was prepared to recommend him for appointment to the position. The selection panel determined to recommend a process by which the plaintiff would be employed on a two year contract, subject to obtaining a subclass 457 visa, with the intention that he be appointed permanently to the position if and when he obtained permanent residency. That proposal recognised that the

relevant employment instruction issued under the *Public Sector Employment and Management Act* provided that permanent residency was a precondition to permanent employment in the Northern Territory public sector.[1] At the time that proposal was formulated the members of the panel understood that the plaintiff held a bridging visa which entitled him to work in Australia on a short-term basis.

[24] It was not unusual for the Department to employ foreign nationals to fill specialist positions, and to provide candidates for employment with assistance to obtain subclass 457 visas for that purpose. In the plaintiff's case, the Department engaged private consultants Move Dynamics and Santa Fe Visa and Immigration Agents to assist the plaintiff with his application.

[25] The plaintiff provided the migration agent from Santa Fe Visa and Immigration Agents with certain information concerning his immigration history, including the decision of the Refugee Review Tribunal. By that stage the High Court had refused special leave to appeal from the decision of the Federal Court and, ultimately, to challenge the decision of the Refugee Review Tribunal. The plaintiff also provided the migration agent with a copy of the order refusing the application for special leave.

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1 See cl 4.2 of Employment Instruction 1 issued pursuant to s 16 of the *Public Sector Employment and Management Act* (NT).

[26] The migration agent subsequently sent the plaintiff an email on 22 September 2014 raising a number of issues. First, in order to lodge an onshore application for a subclass 457 visa while holding a bridging visa it would be necessary to satisfy the relevant Australian Government agency that there were compassionate and compelling circumstances beyond the plaintiff's control which warranted special dispensation to allow an application to be lodged. Secondly, the plaintiff's application for a subclass 457 visa might be refused on character grounds having regard to the Refugee Review Tribunal's findings that the plaintiff had provided false and misleading documents and information. Although that email was not expressed in terms that the plaintiff could not make a valid application for a subclass 457 visa because he had previously been refused a protection visa, it was to the effect that he could not make an application without special dispensation.

[27] The migration agent advised the plaintiff in the same email that his employer/sponsor should be made aware that the application might be unsuccessful. The migration agent also enquired whether the Department knew of the plaintiff's previous immigration history, and whether she had permission to discuss with the Department the risk that the plaintiff's application might be unsuccessful.

[28] The plaintiff replied by email on the same day. That email provided certain information in relation to potential compassionate and

compelling circumstances and public interest considerations. So far as advice to the Department was concerned, the plaintiff stated:

> I do not wish you to discuss my application in detail but you can mention the fact that I was battling with immigration to give me a visa.

[29] On 24 September 2014, Ms Cargill received an email from Jessica Maclean, who was the employee within the Department responsible for coordinating the plaintiff's visa assistance. The email stated that the migration agent from Santa Fe Visa and Immigration Agents had advised Ms Maclean that the plaintiff had "a complicated immigration history", that the plaintiff had requested the agent not to disclose the details of that history, and that the agent had "serious concerns" about the plaintiff's prospects of success in an application for a subclass 457 visa. The agent advised further that the plaintiff had a bridging visa which expired on 9 October 2014, after which time he was not eligible to remain in the country. For that reason, if the Department intended to continue its sponsorship of the application it would need to be lodged prior to 9 October 2014, together with an executed employment contract for the term of the proposed subclass 457 visa.

[30] At that time Cindy-Lee McDonald was the acting regional director in Katherine in Mr Flanagan's absence on leave. After reading the email reporting the advice from the migration agent, Ms Cargill rang Ms McDonald and asked her to speak with the plaintiff to find out whether

there was anything concerning his immigration history that might bear on his recruitment to the Department. Ms McDonald had at that time also taken over Mr Flanagan's responsibilities in the recruitment process. Ms Cargill also sent an email to Mr Flanagan, Ms McDonald and Monica Birkner, the Department's executive director of corporate services, proposing that the Department could continue to support the plaintiff's application by nominating him for the subclass 457 visa, but on the basis that the plaintiff was required to lodge his own application. Ms Cargill suggested that it might be considered inappropriate for the Department to make the application in circumstances where it had no information concerning the plaintiff's immigration history.

[31] On that same day, Ms McDonald spoke to the plaintiff. During the course of that discussion she informed him of the concerns that had been expressed by the migration agent and advised the plaintiff that he would be required to make, and meet the costs of, the application for a subclass 457 visa. The plaintiff did not disclose the issues raised by the migration agent in her email dated 22 September 2014. While the plaintiff did not provide any detail in relation to his immigration history during the course of discussion, it was Ms McDonald's recollection that he advised he had commenced some form of court proceedings in relation to a previous determination by the Commonwealth Department of Immigration and Border Protection, that

the outcome in those proceedings was still pending, and that his immigration history would not present an impediment to his prospective employment.

[32] In his evidence at trial, the plaintiff conceded that he did not want the Department to know he had been deported from the United States, and did not want the migration agent to tell the Department anything of his personal history. However, the plaintiff denied the account of the meeting given by Ms McDonald. In the plaintiff's assertion, the only discussion which took place during the course of that meeting was a request by him that Ms McDonald prevail on Departmental officers in Darwin to move the nomination process along. I reject that assertion and accept Ms McDonald's account of the meeting. I do so both on the basis of my assessment of the reliability of her account as she gave her evidence, and on the basis that it is inherently improbable that there was no discussion of the concerns that had been raised by the migration agent when that was the purpose for which the meeting had been called.

[33] A number of observations may be made concerning the plaintiff's conduct and state of knowledge at the time of that meeting on 24 September 2014.

[34] First, although the migration agent had been engaged by the Department to assist the plaintiff in his visa application, she properly

approached the task on the basis that she was the plaintiff's agent. Accordingly, the migration agent was only permitted to make such disclosures to the Department as were authorised by the plaintiff. Those disclosures were limited to the fact that the plaintiff had a complicated immigration history and there were serious concerns about his prospects of success in the application.

[35] Secondly, the plaintiff was aware by that time that his application for special leave to the High Court had been refused. It would have been misleading to suggest that the outcome of those proceedings was still pending. While the refusal of the application for special leave would not necessarily bear on the Department's decision in the recruitment action, it was a matter which the plaintiff knew was material to his prospects of securing a subclass 457 visa.

[36] Thirdly, although there is no evidence that the plaintiff was specifically aware at that time that any application he submitted for a subclass 457 visa would be invalid, he had been advised that it would be necessary to satisfy the relevant Australian Government agency that there were compassionate and compelling circumstances beyond his control which warranted special dispensation allowing an application to be lodged. That was also a matter material to the plaintiff's eligibility for a subclass 457 visa, and by extension material to the Department's decision in the nomination, application and recruitment action.

[37] Finally, the plaintiff was aware at the time of that meeting that his application for a subclass 457 visa might be refused on character grounds having regard to the Refugee Review Tribunal's finding that he had provided false and misleading documents and information to the Australian authorities in his application for a protection visa, and to the United States immigration authorities. That was also a matter material to the plaintiff's eligibility for a subclass 457 visa, and by extension material to the Department's decision in the nomination, application and recruitment action.

[38] Those matters provided a sufficient basis upon which to conclude that the information provided, and authorised to be provided, by the plaintiff regarding his immigration history was sparse and selective, contained significant omissions, and was misleading in at least one aspect. In making this objective assessment, I do not intend to be overly critical of the plaintiff's conduct in this respect. He was seeking to make a life and forge a career in a new country. He wanted his application for employment and any decision concerning sponsorship for a temporary work visa to be assessed on the basis of his qualifications and work performance, uninfluenced by difficulties he had previously experienced with various immigration authorities. He considered that matters which may have transpired or misrepresentations which may have been made in the past when he was, as he saw it, a displaced person under duress, should not be

allowed to prejudice his current circumstances. He was no doubt concerned that full disclosure might bear upon the Department's attitude to his continuing employment.

[39] These motivations are understandable. It remains the case, however, that employees of the Department might genuinely and reasonably have formed the view that the plaintiff withheld information from the Department which was relevant to its determination whether to sponsor his nomination and application for a subclass 457 visa, and whether to offer him direct employment in a professional position which carried substantial responsibilities.

[40] On the basis of the assurances given by the plaintiff during the course of the meeting with Ms McDonald, on 25 September 2014 the selection panel executed a memorandum addressed to Mr McHugh, the chief executive officer of the Department, recommending that the plaintiff be appointed temporarily to the position, that the Department sponsor the plaintiff's nomination for the grant of a subclass 457 visa for a period of two years, and that the Department subsequently support the plaintiff's application for permanent residency with a view to appointing him permanently to the position. Ms Birkner endorsed that recommendation and it was accepted by Mr McHugh.

[41] On 29 September 2014, Ms Maclean advised Ms Cargill and Ms McDonald that the Northern Territory Department of Corporate and

Information Services, which was the central agency responsible for the defendant's personnel services, had earlier that day erroneously emailed the plaintiff an offer of permanent employment rather than the offer of employment on a two year contract. The plaintiff had signed and returned the letter of offer for permanent employment. Ms Cargill made contact with the responsible officer at the Department of Corporate and Information Services and discussed the matter with her. The error was acknowledged and the responsible officer advised that a replacement offer for employment on a two year contract would be sent to the plaintiff. That was done.

[42] Following her discussion with the responsible officer at the Department of Corporate and Information Services, Ms Cargill made contact with the plaintiff by telephone, informed him of the error, and requested that he sign and return the offer of employment for the fixed period of two years as soon as possible as it was required to enable the migration agent to submit the visa nomination. The plaintiff advised Ms Cargill that he would do so. Ms McDonald also spoke to the plaintiff in person at the Katherine office to make sure he understood what had happened. The plaintiff advised Ms McDonald that he understood the situation and would sign and return the two year contract as soon as it was received.

[43] The plaintiff sent an executed copy of the contract of employment for a two year term to the Department of Corporate and Information Services

by email at 5:30 pm on 29 September 2014 (which was also copied to Ms Maclean and Ms McDonald). The plaintiff then spoke to Ms McDonald in Katherine and advised that he had executed and returned the contract for the two year term.

[44] In his evidence during the trial, the plaintiff trenchantly denied ever receiving and executing a contract for a two year term. He asserts that he only ever received, executed and returned a contract for permanent employment. He denies having any discussion with either Ms McDonald or Ms Cargill in relation to any error concerning the first contract sent or the transmission of a replacement contract for a two year term. I reject those assertions on the basis that they are directly inconsistent with the evidence given by Ms McDonald and Ms Cargill concerning those transactions, and inconsistent with objective and contemporaneous documentary evidence.

[45] At 2:36 pm on 29 September 2014 the plaintiff sent an email to Ms Maclean. The subject matter heading for the email was "Contract". That email was sent after the plaintiff had executed and returned the contract for permanent employment that morning, and after the time at which Ms McDonald and Ms Cargill said they had explained the error to the plaintiff. The email read: "I haven't received anything yet!" Ms Maclean sent an email in reply at 2:38 pm advising the plaintiff to "let me know if they haven't by the end of the day and I will follow up with them again." The plaintiff then sent a further email to Ms Maclean at

4:25 pm on that day which stated: “Just to remind you that as of 4:25 PM I still have not gotten anything yet.”

[46] Those emails were followed by a further email from the plaintiff to the employment services team at 5:30 pm on 29 September 2014. That email was copied to Ms Maclean and Ms McDonald. It provided: “Attached, please find my signed contract for your record.” There is also on file a contract for the period between 6 October 2014 and 5 October 2016 which has been executed and dated by the plaintiff on 29 September 2014. The irresistible inference is that these emails were references to the replacement contract for a term of two years. The plaintiff’s denials of that matter in cross-examination were unconvincing.[2]

[47] On 30 September 2014, the plaintiff completed a Commencement Form and returned it to the Department of Corporate and Information Services. Amongst other details, that form provided that the plaintiff was a temporary resident with a Bridging Visa C that enabled him to undertake employment in Australia. That form also nominated the visa expiry date as 9 October 2014. These matters were already known by the Department as a result of information provided by the migration agent. The Commencement Form did not require the provision of any

2 It should be noted that this finding is of no relevance to the determination whether or not the plaintiff was defamed by the defendant or its agent, although it might conceivably have some bearing on the issue of damages.

further information in relation to the plaintiff's immigration history and status, and nor did the plaintiff provide any further information in that respect.

[48] The Department subsequently nominated the plaintiff for a subclass 457 visa. On 7 October 2014, the migration agent provided Ms Cargill with a notice from the Commonwealth Department of Immigration and Border Protection approving the plaintiff's nomination. Ms Cargill forwarded that notice to the plaintiff to enable him to lodge his visa application.

[49] On or about 22 October 2014, Ms McDonald received a complaint concerning the plaintiff's conduct from Victoria Edmonds, an employee of the Department working in the Katherine office. Ms Edmonds performed a communications function within the Department, which included providing public notice of roadworks and associated closures. The contemporaneous file notes and emails concerning that complaint disclosed the following matters.

[50] As a result of roadworks being supervised by the plaintiff, access into and from Bicentennial Road in Katherine had been closed. Ms Edmonds was not advised of this impending closure in circumstances where she considered an appropriate public notice should have been given. There was an incident in which the plaintiff and Ms Edmonds clashed in relation to that matter.

[51] On 22 October 2015, Ms McDonald spoke to the plaintiff concerning his dealings with Ms Edmonds. She advised him that it was inappropriate for him to speak to Ms Edmonds in "the way he does", and that it was important in the work environment for proper regard to be given to everybody's opinions and ideas. Ms McDonald advised the plaintiff further that he did not listen to opinions and ideas expressed by other employees, and was given to "closing them out".

[52] On 23 October 2014, Ms McDonald reported the incident and the counselling of the plaintiff to Ms Cargill.

[53] On 24 October 2014, the plaintiff and Ms Edmonds had another "run in" concerning the lack of information about access into and from Bicentennial Road. The plaintiff indicated that it was not possible to provide advance notice of all work schedules and road closures. The discussion was apparently heated, and the plaintiff advised Ms Edmonds that she would not be given regular updates on the project timeline. Ms Edmonds expressed the view, both to the plaintiff and subsequently to Ms McDonald, that she was unable to perform her public relations role without project information concerning road closures.

[54] In an email describing the exchanges, Ms Edmonds frankly admitted that she "yelled" at the plaintiff on both occasions in the office setting. She said she was humiliated by her own unprofessional behaviour, but

that she had been frustrated and insulted by what she characterised as the plaintiff's arrogant, overbearing, insulting and obstructive behaviours.

[55] On 28 October 2014, Ms McDonald spoke to the plaintiff again in relation to the matter. She advised the plaintiff that he could not speak to staff in the way that he did, and that it was not acceptable for him as a manager to withhold information that was required for the performance of another officer's job. She also reiterated to the plaintiff that his manner could appear arrogant and overbearing, which was particularly problematic in a small office. The plaintiff's response was to the effect that he handled matters in accordance with his own style and precepts, and that his perspective concerning his behaviours was different to that of Ms McDonald.

[56] On 29 October 2014, Ms McDonald convened a staff meeting to discuss cash reviews. She posed questions to staff, including the plaintiff, in relation to cash flows, contingencies and project dates. On Ms McDonald's account, the plaintiff became heated, loud, intimidating and rude during the course of that exchange. In the presence of other staff the plaintiff said that Ms McDonald did not know what she was talking about and that he had far more experience than her. From Ms McDonald's perspective, at least, the plaintiff responded poorly to questioning on those issues.

[57] Ms McDonald then closed the meeting but asked the plaintiff to stay behind when the other participants had left. She advised him that it was inappropriate for him to talk to her in that manner when she was seeking only to identify responses to the questions which Mr McHugh would shortly be asking about matters of cash flow and project timing. The plaintiff responded loudly and abusively. Ms McDonald advised him that she would report his conduct to Mr Pemble, who was the Department's executive director of civil services, and that a formal warning would be given if his inappropriate behaviours continued.

[58] On 31 October 2014, Ms McDonald informed Mr Pemble of her dealings with the plaintiff in relation to those matters. At or about the same time Ms McDonald informed Ms Birkner that she had counselled the plaintiff concerning the manner in which he was speaking to female staff. Ms Birkner subsequently asked Ms Cargill to monitor the matter.

[59] In his evidence at trial the plaintiff accepted that Ms McDonald had spoken to him in relation to his dealings with Ms Edmonds, but he did not accept Ms McDonald's account of the content of those discussions. The plaintiff also denied ever having any discussion with Ms McDonald in relation to his conduct towards her, either on 29 October 2014 or at all. I reject those accounts, principally on the basis that Ms McDonald's account is consistent with the contemporaneous and objective file notes and emails concerning the dealings in question, and consistent with what she told Ms Cargill and Mr Pemble at that time.

Conversely, the plaintiff's account shows little or no correlation with the objective evidence.

[60] Again, in making that finding I do not intend to be overly critical of the plaintiff. In my assessment of his evidence, and of his presentation during the course of the trial generally, he genuinely believed that there was nothing inappropriate about his behaviours in the workplace. The plaintiff has a somewhat florid, loquacious and assertive manner which might easily be characterised as overbearing and offensive. There may also have been some element of cultural misunderstanding in terms of the appropriate tenor of interactions in the workplace. I do not doubt that Ms McDonald and Ms Edmonds perceived the plaintiff's behaviours to be inappropriate according to prevailing workplace standards. At the same time, I accept that the plaintiff's subjective perception of his behaviours was quite different.

[61] During the course of the trial the plaintiff also sought to cross-examine Mr Pemble with a view to establishing the validity of the position adopted by the plaintiff in his dealings with Ms Edmonds concerning the provision of project information. That cross-examination failed to appreciate that the principal concern expressed in relation to those dealings was the manner in which the plaintiff had dealt with Ms Edmonds, rather than the technical validity of the respective positions adopted in those dealings.

[62] As it was, the product of the cross-examination was, in essence, that the information provided by the plaintiff concerning road closures was scant; that it was not unreasonable to ask contractors for further details concerning traffic disruptions after the production of a Master Plan; that a contractor could reasonably be expected to provide advance notice of what part of a traffic management plan was being implemented on any given day; that there were standard contractual clauses dealing with the notice required to be given by contractors in advance of road disruptions; and that it was usual practice to give public notice of altered road conditions, particularly in relation to critical intersection closures. That evidence did not assist the plaintiff's cause.

[63] On 13 November 2014, the principal of a private contractor which was conducting roadworks under contract with the defendant contacted Mr McHugh to complain about the treatment he had been receiving from the plaintiff. The complaint was in essence that the plaintiff was dictatorial and dogmatic in his approach to contract supervision, and either unable or unwilling to consider the views of others.

[64] Later that day, Mr Pemble informed Mr Flanagan that the complaint had been made, and that it involved the plaintiff's behaviour towards the contractor concerning claims for variation. Mr Pemble asked Mr Flanagan to intervene and see if he could resolve the problem. Mr Flanagan convened a meeting with the contractor and was able to

resolve the issues. In the resolution of those issues some of the variation claims were approved and others were not.

[65] On 18 November 2014, Mr McHugh convened a meeting with the plaintiff. Mr Pemble and Mr Flanagan were also in attendance. The purpose of the meeting was to discuss the complaint that had been made to Mr McHugh by the contractor. Mr McHugh advised the plaintiff that staff needed to work with contractors in order to resolve disputes rather than adopting an adversarial approach that would lead inevitably to protracted litigation. So far as the issue with this particular contractor was concerned, it became apparent during the course of the meeting that the plaintiff considered he was negotiating within a fixed budget. Mr McHugh advised the plaintiff that budgetary issues should not necessarily preclude the approval of variations if warranted; and that in the event additional funding was required to resolve an issue, the matter should be referred to Mr Pemble.

[66] The following day, Mr Campbell and Mr Flanagan met separately with the plaintiff. During the course of that meeting it was decided that the plaintiff would spend the following week in Darwin so that he could gain a better understanding of the business processes, procedures and structure of the Department. It is plain from the response of the Departmental employees to the complaint that there was no intention to terminate the plaintiff's employment for that reason. Rather, the

determination was that the plaintiff should be counselled and assisted in relation to practices and interactions in the contract supervision role.

[67] During the course of the trial the plaintiff cross-examined Mr McHugh, Mr Pemble and Mr Flanagan concerning the project in respect of which the complaint had been made. The patent purpose of the plaintiff's cross-examination in that respect was to establish that his rejection of various claims by the contractor was justified. The witnesses' responses to that line of cross-examination were, in essence, that the plaintiff's role as the Superintendent's representative was to ensure that claims for variation were fair and reasonable and to ensure that contractors were held to account for poor workmanship, but to adopt a reasonable and collaborative approach in doing so.

[68] The plaintiff also conducted a detailed examination of Mr Flanagan directed to a particular claim for variation involving a road crossing with culverts. Again, that cross-examination failed to appreciate that the concern raised involved the plaintiff's attitude and approach in his dealings with contractors rather than the technical validity of the respective positions.

[69] As it was, the product of the cross-examination was, in essence, that a contractor was entitled to a variation for additional work required which was not obvious at the start of the project; that a contractor may be entitled to a variation if the job becomes more complicated by the

unexpected location and configuration of services and utilities; that the plaintiff's direction to the contractor as to how the road crossing job should have been performed was in conflict with the directions given to the contractor by the power and water corporation; that the cost and complexity of the job could not be assessed by reference to the amount of concrete involved; and that the quotes for the rock breaking, earthmoving and excavation provided by the contractor were not misleading. Again, that evidence did not assist the plaintiff's cause.

[70] By notice dated 19 November 2014, the Commonwealth Department of Immigration and Border Protection advised the plaintiff that his application for a subclass 457 visa was invalid by operation of s 48 of the *Migration Act 1958* (Cth). That section provided that a person was not permitted to apply for a subclass 457 visa if he or she did not hold a substantive visa and after last entering Australia has been refused a Protection Visa (subclass 866). The notice went on to assert that the plaintiff had been refused a subclass 866 visa on 23 March 2012.

[71] Following receipt of that notice the plaintiff made a direct approach to the office of the Minister requesting that he send a letter to the responsible Commonwealth Minister intervening in the plaintiff's visa application. On 21 November 2014, the Minister's office referred the request to the Department for consideration and advice. Ms Birkner requested Ms Cargill to deal with the matter. It is significant in the contextual sense that the Ministerial Briefing was drafted and sent in

response to the request from the Minister's office, which was prompted in turn by the plaintiff's request for intervention.

[72] On 24 November 2014, Ms Cargill discussed the plaintiff's request for intervention with Mr Pemble. Ms Cargill informed Mr Pemble that the plaintiff was ineligible for a subclass 457 visa. She expressed her concern that the plaintiff had led the Department to believe that he was eligible to apply for a subclass 457 visa, and that he had withheld information concerning his immigration history which was relevant to the recruitment action being undertaken by the Department. On that basis, Ms Cargill's view was that the Minister should not intervene in support of the plaintiff's application. Mr Pemble expressed his preliminary agreement with that view, but it was determined to discuss the matter with the plaintiff before any final decision was made.

[73] Ms Cargill and Ms McDonald met with the plaintiff for that purpose on 24 November 2014. Their evidence is that during the course of that meeting the plaintiff advised that his application for a subclass 457 visa had been declared invalid because he had previously applied for a protection visa and was unsuccessful in that application. The plaintiff advised further that he had appealed the decision. Ms Cargill told the plaintiff that he should have disclosed that information at the time the recruitment action was taking place. The plaintiff said that he would send Ms Cargill all the relevant information.

[74] In his evidence at trial, the plaintiff accepted that he met briefly with Ms Cargill and Ms McDonald on that day, but denied that the content of the meeting was as described by them. The evidence given by Ms Cargill and Ms McDonald as to the content of that meeting is consistent, and I accept their accounts. Perhaps most significantly, however, later that day the plaintiff sent Ms Cargill an email attaching the decision of the Refugee Review Tribunal dated 22 October 2012 affirming the decision not to grant the plaintiff a protection visa. The plaintiff's conduct in doing so was entirely consistent with the accounts given by Ms Cargill and Ms McDonald in relation to the content of the meeting on that day. I do not accept the plaintiff's account that he provided the decision of the Refugee Review Tribunal on his own initiative rather than in response to the approach made by Ms Cargill and Ms McDonald.

[75] On reading the decision, Ms Cargill noted the following matters:

(a) the plaintiff had been twice deported from the United States of America;

(b) the plaintiff's second entry to the United States had been effected by the use of a false identity;

(c) shortly after the plaintiff's second deportation from the United States he entered Australia on a passport belonging to another person;

(d) the plaintiff's application for a protection visa had been made on 3 June 2011 and refused on 23 March 2012; and

(e) on review of that decision the Refugee Review Tribunal found that the plaintiff had fabricated evidence and was not a witness of truth.

[76] On the basis of those matters Ms Cargill formed the view that a question arose as to the plaintiff's suitability for the position he then occupied with the Department. She discussed those concerns with Mr Pemble. At that time, the plaintiff was in Darwin for the purpose of the induction and orientation program which had been arranged during the course of the meeting on 19 November 2014.

[77] On 25 November 2014, Mr Pemble and Ms Cargill met with the plaintiff to discuss the Department's sponsorship of his visa application and his request for Ministerial intervention. Mr Pemble informed the plaintiff that the Department would be investigating the issues that had been raised in relation to his immigration history, and that the Department would not support the request for Ministerial intervention. Mr Pemble then directed the plaintiff to return to the Katherine office.

[78] Ms Cargill drafted the Ministerial Briefing on 25 November 2014. The parts of that document said to convey the defamatory imputations are in the following terms:

> Through recent discussions with [the plaintiff] and evidence provided by him regarding his immigration history it appears [the plaintiff] has not been truthful nor comprehensive in providing information to the department on his complicated immigration history at the time of recruitment. The department was not made aware [the plaintiff] was ineligible to apply for a 457 visa at the time of nomination.
>
> The Australian Refugee Review Tribunal decision not to grant [the plaintiff] a Protection (Class XA) visa found [the plaintiff] was not a reliable witness, his evidence was characterised by inconsistency, exaggeration, and fabrication. The Tribunal concluded [the plaintiff] had fabricated his evidence, misrepresented the facts, and was a person who had the propensity to tailor and embellish claims to achieve a favourable migration decision.
>
> In addition, since [the plaintiff's] commencement with the department, there have been a number of ongoing complaints in relation to [the plaintiff's] inappropriate treatment of other public sector officers and private contractors. These issues have been discussed with [the plaintiff] on a number of occasions.

[79] I find that at the time Ms Cargill drafted that document she genuinely believed that the content which conveyed the defamatory imputations concerning the plaintiff's conduct was true, and further genuinely believed that it was her duty and that of the Department to convey the information to the Minister to inform his determination concerning whether to write to the Commonwealth Minister for Immigration and Border Protection in support of the plaintiff's application for a visa.

[80] So far as the first imputation is concerned, Ms Cargill believed that the plaintiff had not been frank concerning his immigration history in his disclosures to Ms McDonald on 24 September 2014. The various

matters and transactions which led Ms Cargill to that belief have been described above.

[81] So far as the second imputation is concerned, Ms Cargill believed that the plaintiff had fabricated evidence to the Refugee Review Tribunal on the basis of her reading of the statement of reasons. The language used in the Ministerial Briefing in that respect largely adopts what was said in paragraph [120] of the statement of reasons.

[82] So far as the third imputation is concerned, Mr Pemble had previously informed Ms Cargill that he and Mr McHugh had discussed the complaint which had been made by a private contractor concerning the plaintiff's supervision of contractual works. Ms Cargill was aware that Mr Pemble and Mr McHugh had spoken to the plaintiff with a view to improving his understanding of the appropriate manner in which to deal with private contractors.

[83] It may be noted in this respect that the Ministerial Briefing refers to complaints in relation to the plaintiff's dealings with "private contractors". Mr McHugh's recollection was that he was told there had been complaints concerning the plaintiff's approach to contract supervision from more than one contractor, and that was also Ms Cargill's understanding. Mr McHugh accepted, however, that only one complaint had been made to him directly. Mr Pemble's evidence was that he was only aware of the one complaint in respect of which the

plaintiff had been counselled. Mr Flanagan's evidence made reference to disputes that had arisen in the context of both the Carpentaria Highway project and the Bicentennial Road project. Considered as a whole, that evidence did not operate to cast doubt on the genuineness of the understandings held by Mr McHugh and Ms Cargill in relation to the question of complaint.

[84] Ms Cargill had also been informed by Ms McDonald that the plaintiff had behaved inappropriately towards Ms McDonald and another employee in the Katherine office, and that as a result Ms McDonald had occasion to counsel the plaintiff informally about his behaviour on a number of occasions.

[85] Ms Cargill provided a draft of the Ministerial Briefing to Ms Birkner, who approved the document for presentation to Mr McHugh. I also find that Ms Birkner believed that the three imputations contained in the document were true. She also believed that it was her duty and that of the Department to convey that information to the Minister in explanation of the Department's recommendation against Ministerial intervention in the plaintiff's visa application, and its intention to terminate the plaintiff's employment.

[86] So far as the imputations were concerned, Ms Birkner considered that the plaintiff had not been frank in his communications with the Department on the basis that his assurances to Ms McDonald on 24

September 2014 were misleading, that he had expressly refused to allow the migration agent to discuss his details with the Department, and that he had failed to draw the Department's attention to the result of his application for a protection visa and subsequent appeals. Ms Birkner had also been informed of the difficulties concerning the plaintiff's dealings with other staff and contractors.

[87] For those same general reasons, I also find that Mr McHugh believed the imputations contained in the Ministerial Briefing were true and that it was his duty to convey that information to the Minister.

[88] For those same reasons, and having regard to the content of the dealings and transactions described above, I find that the conduct of Ms Cargill, Ms Birkner and Mr McHugh in variously drafting, approving and publishing the Ministerial Briefing was not actuated by malice.

[89] By the time she drafted the Ministerial Briefing, Ms Cargill was also of the understanding that the plaintiff's bridging visa would expire on 17 December 2014 and that he would be unable to work in Australia after that date. Against that background, Mr McHugh sent the plaintiff a letter dated 26 November 2014 advising of his intention to terminate the plaintiff's contract of employment pursuant to s 33 of the *Public Sector Employment and Management Act*. The letter invited the plaintiff to make any submission he wished in relation to that intention

within seven days from receipt of the letter. The plaintiff provided a response by letter dated 2 December 2014. By further letter dated 10 December 2014 Mr McHugh advised the plaintiff that his employment would be terminated with effect from 17 December 2014.

[90] It should also be noted for the sake of completeness that the plaintiff's claim document makes reference at paragraphs 14 and 18 to those letters dated 26 November and 10 December 2014, and to a further communication sent to him by Ms Cargill on 27 November 2014, as evidence that Departmental employees fabricated the statements contained in the Ministerial Briefing. It is not entirely clear whether the plaintiff asserts that those indications were also defamatory.

[91] If that assertion is made, the imputations contained in those communications are less comprehensive, and go no further, than the imputations contained in the Ministerial Briefing. To the extent that they conveyed any defamatory imputations, the authors' belief was founded on the same matters as their belief in the content of the relevant parts of the Ministerial Briefing. It is also the case that those communications were directed to the plaintiff rather than published to the Minister.

Issue estoppel

[92] At the commencement of the hearing counsel for the defendant raised an issue concerning a potential issue estoppel. On 12 March 2015 the

plaintiff filed an adverse action application in the Federal Circuit Court pursuant to s 351 of the *Fair Work Act 2009* (Cth). The application alleged that the Department had terminated his employment on the basis of race or national extraction.

[93] The Federal Circuit Court delivered its decision in the application on 27 July 2016. The formal order made in that respect was that "[t]he application filed 12 March 2015 be dismissed". The Federal Circuit Court provided *ex tempore* reasons for judgment. So far as is relevant to the question of issue estoppel, those reasons provided:

> [17] … On the morning of 24 November 2014 Ms Cargill, as the director of HR, and a Ms McDonald, who was then the acting regional director of the Katherine office of the respondent and at that time replacing Mr Flanagan who was on leave, met with the applicant to discuss his request for ministerial intervention. The applicant told them that his protection visa application had been refused and so he was ineligible for a 457 visa.
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> [18] There is some issue about this meeting and its consequences because Ms Cargill and Ms McDonald in their affidavits are critical of the applicant and claim he was aware at the time he sought employment that he was ineligible for a 457 visa and in effect misled the department and such is the respondent's case here. I do not accept that. It is clear that Ms Ende advised Ms Cargill that the 457 visa application may not be approved and that advice was given to Ms Cargill on 24 September 2014 before the respondent was employed or an offer of employment was made.
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> [19] Further, there was no evidence that the applicant was aware of his ineligibility for a 457 visa. There is nothing to suggest that he had a greater knowledge of the requirements of the *Migration Act* than the migration agent, Ms Ende, retained by the department. She had advised, as I have already mentioned, that the applicant had a "complicated migration

history" and his application for a 457 visa may not be approved …

….

[27] … I also find the other matters, in particular the complaints communicated by Ms McDonald and the misapprehension about the applicant misleading the department about his 457 eligibility, were also operative and substantial reasons for the decision. Each of those matters is referred to in the ministerial briefing note prepared by Ms Cargill. In relation to the claim in the ministerial briefing note, which I have already referred to, that [the plaintiff] misled the respondent in relation to his 457 visa eligibility, I find that is wrong …

[28] … The positive finding I make is that the operative and substantial reasons for the termination of the applicant's employment were those set out in the ministerial briefing note prepared by Ms Cargill. They can be summarised as follows:

(a) Complaints from other staff, particularly Ms McDonald, about [the plaintiff];
(b) A belief that [the plaintiff] had misled the department about his 457 eligibility. I find that that belief, while unreasonable, was likely to have been genuinely held; and
(c) The further information set out in the RRT decision, which I have referred to, particularly about [the plaintiff's] migration history.

[94] Counsel for the defendant in these proceedings drew attention to the fact that this finding had potential relevance to various of the defences pleaded in the subject proceedings.

[95] The statutory defence of qualified privilege, at least, requires that the conduct of the defendant in publishing the defamatory material is reasonable in the circumstances.[3] If the finding made by the Federal

3 *Defamation Act*, s 27(1).

Circuit Court that Ms Cargill's belief was genuinely held, and the reason for termination genuinely proffered, is properly characterised as a finding that the conduct of the defendant in publishing the defamatory material was reasonable in the circumstances, the parties may be bound by issue estoppel to that finding. If so, that element of the defence of qualified privilege would necessarily be made out, as would the corresponding element of the defence of honest opinion.

[96] On the other hand, the defence of justification requires that the content of the publication is substantially true. If the finding made by the Federal Circuit Court that Ms Cargill's belief that the plaintiff had misled the Department was unreasonably held is properly characterised as a finding that the relevant publication was false, the parties may also be bound by issue estoppel to that finding. If so, the defendant would necessarily fail to make out that element of the defence of justification in relation to that particular imputation.

[97] It is also implicit in the findings of the Federal Circuit Court that Ms Cargill genuinely believed that other staff had made complaints concerning the plaintiff and that the decision of the Refugee Review Tribunal contained adverse material concerning the plaintiff, although no finding was made in relation to the merits of those complaints. Again, if the parties are bound by issue estoppel to the findings made by the Federal Circuit Court in that respect, that element of the defence of qualified privilege is necessarily made out in relation to the second

and third imputations, and the defence of justification would remain open for those imputations. It falls then to determine whether the parties are bound by issue estoppel to those findings.

[98] The parties to the adverse action claim were recorded to be the plaintiff as applicant and the "Department of Infrastructure" as respondent. The Department has no legal personality. It is an agency of the Northern Territory of Australia, which is the juridical entity under which claims against that body politic and its agencies may be brought.[4] Accordingly, the parties to the adverse action claim and the parties to the within proceedings were in effect the same.

[99] Where a judicial tribunal with jurisdiction over a cause of action and the parties to that cause of action gives judgment, the parties are barred by *res judicata* from bringing another proceeding on the same cause of action, and also barred by issue estoppel from re-litigating in another proceeding on a different cause of action any question necessarily decided as part of the first judgment. In *Blair & Perpetual Trustee Co Ltd v Curran*, Dixon J described the operation of issue estoppel in the following terms:[5]

> The estoppel covers only those matters which the prior judgment, decree or order necessarily established as the legal foundation or justification of its conclusion … Nothing but what is legally indispensable to the conclusion is thus finally … precluded. In

4 *Crown Proceedings Act* (NT), s 5.

5 *Blair & Perpetual Trustee Co Ltd v Curran* (1939) 62 CLR 464 at 531-3.

> matters of fact the issue-estoppel is confined to those ultimate facts which form the ingredients in the cause of action, that is, the title to the right … Where the conclusion is against the existence of a right or claim which in point of law depends upon a number of ingredients or ultimate facts the absence of any one of which would be enough to defeat the claim, the estoppel covers only the actual ground upon which the existence of the right was negatived. But in neither case is the estoppel confined to the final legal conclusion expressed in the judgment, decree or order … [T]he judicial determination concludes, not merely as to the point actually decided, but as to a matter which it was necessary to decide and which was actually decided as the groundwork of the decision itself, though not then directly the point at issue … "[A] fact fundamental to the decision arrived at" in the former proceedings and "the legal quality of the fact" must be taken as finally and conclusively established. But matters of law or fact which are subsidiary or collateral are not covered by the estoppel. Findings, however deliberate and formal, which concern only evidentiary facts and not ultimate facts forming the very title to rights give rise to no preclusion. Decisions upon matters of law which amount to no more than steps in a process of reasoning tending to establish or support the proposition upon which the rights depend do not estop the parties if the same matters of law arise in subsequent litigation.

[100] The first question to be determined is whether the issue is the same in both proceedings. If so, the second question for determination is whether the issue was fundamental to the decision in the first proceeding. That calls for an enquiry into precisely what the court in the first proceeding was required to decide,[6] and the precise issue of fact or law arising in the second proceeding which is said to be the subject of an issue estoppel.[7] In order to find that the issue is the same

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6 *Murphy v Abi-Saab* (1995) 37 NSWLR 280 at 288 per Gleeson CJ (Kirby P and Rolfe AJA agreeing).

7 *Linsley v Petrie* [1998] 1 VR 427 at 429 per Hayne JA.

in both proceedings "it … must be possible to assert without doubt that the issues are identical."[8]

[101] The ultimate fact the Federal Circuit Court was required to determine was whether the respondent terminated the applicant's employment because of the applicant's race or national extraction.[9] There was a statutory presumption in the adverse action claim that the respondent did in fact terminate the applicant's employment for one or other of the unlawful reasons unless the respondent proved otherwise.[10] It was therefore incumbent on the respondent to prove the reason(s) why it terminated the applicant's employment, and in particular to prove that it terminated the applicant's employment for the three reasons set out in the Ministerial Briefing. It was only on making that positive finding that the Federal Circuit Court was able to determine that the respondent did not terminate the applicant's employment because of his race or national extraction.[11]

[102] In order to come to that finding, it was necessary in an evidential sense to find that those reasons were operative rather than pretextual, and one of the factual findings informing that question was that the belief the

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8 *Co-ownership Land Development Pty Ltd v Queensland Estates Pty Ltd* (1973) 47ALJR 519 at 522 per Walsh J; *Ramsay v Pigram* (1968) 118 CLR 271 at 276 per Barwick CJ.

9 *Fair Work Act 2009* (Cth), s 351.

10 *Fair Work Act 2009* (Cth), s 361.

11 *Board of Bendigo Regional Institute of Technical and Further Education v Barclay* (2012) 248 CLR 500 at [41]-[45], [127], [146]; *Construction, Forestry, Mining and Energy Union v BHP Coal Pty Ltd* (2014) 253 CLR 243 at [9]-[10], [19]-[22], [89]-[93].

plaintiff had misled the Department about his 457 eligibility was unreasonably but genuinely held. This was the issue determined in the proceedings before the Federal Circuit Court which might conceivably give rise to an issue estoppel in the present proceedings.

[103] So far as the defence of qualified privilege in the present proceedings is concerned, the relevant issue is whether the conduct of the defendant in publishing the defamatory material was reasonable in all the circumstances. That determination involves a multiplicity of considerations incapable of reduction to the question whether the publisher genuinely believed that the content of the publication was true. While the finding of honest belief might be an evidentiary fact going to the question of the reasonableness, it does not condition a finding that publishing the material was reasonable in the mutual interest context.

[104] Even in cases where belief is a critical element in the proof of reasonableness, the relevant question in the context of qualified privilege is whether the belief is honestly held, not whether the belief was reasonable or held on reasonable grounds.[12] A person may hold an honest belief in the truth of material even though it would fail on an objective test of truth. While actuation by malice would no doubt

12 *Morgan v John Fairfax & Sons Ltd (No 2)* (1991) 23 NSWLR 374 at 382 per Hunt AJA (Samuels JA concurring).

preclude a finding that publication of the matter was reasonable in the circumstances, mistake or misapprehension is not suggestive of malice.

[105] Stated in that fashion, the relevant issues for determination in each proceeding were similar in one narrow aspect but not identical, and the doctrine of issue estoppel has no application in the circumstances.

[106] Apart from that lack of identity, the issue as determined by the Federal Circuit Court was not an ultimate fact on which the defence in question depended. The finding of genuine belief was based on various documents and transactions and had the character of an evidentiary fact which could not found an issue estoppel.[13] It was no doubt one of the evidentiary facts leading to the conclusion that the reasons for termination were as recorded in the Ministerial Briefing; but it was that conclusion which formed the essential ingredient or integer of the determination that the applicant's termination was not effected for an unlawful reason. The finding that the belief was genuine was subsidiary only to that determination; and the finding that the relevant belief was unreasonably held was entirely superfluous to that determination.

[107] So far as the defence of qualified privilege is concerned, no issue estoppel arises in relation to either the genuineness or the

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13 *Co-ownership Land Development Pty Ltd v Queensland Estates Pty Ltd* (1973) 47ALJR 519 at 524 per Walsh J.

reasonableness of Ms Cargill's belief concerning the truth of the imputation that the plaintiff had misled the Department concerning his immigration history and status. Even if there is an issue estoppel, it is apparent from the reasons which follow in relation to the defence of qualified privilege that the result in that aspect would be the same.

Qualified privilege

[108] The defendant properly accepts that if the plaintiff has been defamed it is vicariously liable for the conduct of its agents and employees in the publication of the defamatory materials.[14] There is obviously no suggestion that the Departmental employees were acting outside the scope of their duty in making the publication in question. As a corollary, it follows that if the Departmental employees have a defence of qualified privilege that protection will also extend to the defendant.[15] There is no suggestion in the present case that the defendant had any state of mind or motivation separate to the agents and employees who made the publication.

[109] Section 27 of the *Defamation Act* provides:

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14 *New South Wales Country Press Co-operative Co Ltd v Stewart* (1911) 12 CLR 481 at 499-500; *Webb v Bloch* (1928) 41 CLR 331 at 365-6. Section 4 of the *Defamation Act* provides that the Act binds the Crown in right of the Territory. It follows the Territory is amenable to sued for defamation.

15 *Stephens v West Australian Newspapers Ltd* (1994) 182 CLR 211 at 253; *Roberts v Bass* (2002) 212 CLR 1 at [181]-[183]. Section 5 of the *Defamation Act* provides expressly that the Act does not affect the operation of the general law in relation to the tort of defamation except to the extent that the Act provides otherwise. Section 21 of the *Defamation Act* provides expressly that the statutory defences do not "vitiate, limit or abrogate" the defences at general law. It follows that both the statutory defences and the defences at general law remain available to the defendant, as pleaded in paragraph 20 of the Notice of Defence.

Defence of qualified privilege for provision of certain information

(1) There is a defence of qualified privilege for the publication of defamatory matter to a person (the "recipient") if the defendant proves that –

(a) the recipient has an interest or apparent interest in having information on some subject; and

(b) the matter is published to the recipient in the course of giving to the recipient information on that subject; and

(c) the conduct of the defendant in publishing that matter is reasonable in the circumstances.

(2) For the purposes of subsection (1), a recipient has an apparent interest in having information on some subject if, and only if, at the time of the publication in question, the defendant believes on reasonable grounds that the recipient has that interest.

(3) In determining for the purposes of subsection (1) whether the conduct of the defendant in publishing matter about a person is reasonable in the circumstances, a court may take into account –

(a) the extent to which the matter published is of public interest; and

(b) the extent to which the matter published relates to the performance of the public functions or activities of the person; and

(c) the seriousness of any defamatory imputation carried by the matter published; and

(d) the extent to which the matter published distinguishes between suspicions, allegations and proven facts; and

(e) whether it was in the public interest in the circumstances for the matter published to be published expeditiously; and

(f) the nature of the business environment in which the defendant operates; and

(g) the sources of the information in the matter published and the integrity of those sources; and

(h) whether the matter published contained the substance of the person's side of the story and, if not, whether a reasonable attempt was made by the defendant to obtain and publish a response from the person; and

(i) any other steps taken to verify the information in the matter published; and

(j) any other circumstances that the court considers relevant.

(4) To avoid doubt, a defence of qualified privilege under subsection (1) is defeated if the plaintiff proves that the publication of the defamatory matter was actuated by malice.

(5) However, a defence of qualified privilege under subsection (1) is not defeated merely because the defamatory matter was published for reward.

[110] As is apparent from the text of that provision, the statutory defence of qualified privilege will be made out if the defendant proves: (a) the Minister had an interest or apparent interest in having information in relation to the plaintiff's application for a subclass 457 visa and the Department's intentions in relation to his employment; and (b) the defamatory imputations were published to the Minister in the course of giving him information on those subjects; and (c) the conduct of the Departmental employees (principally Ms Cargill, Ms Birkner and Mr McHugh) in publishing that material was reasonable in the circumstances.

[111] The Minister will be taken to have an apparent interest in having information on those matters if at the time of the publication in question the relevant Departmental employees believed on reasonable grounds that the Minister had that interest. As is apparent from the findings of fact detailed above, the Minister clearly had that interest and the relevant Departmental employees clearly had that belief. In fact, the Ministerial Briefing was drafted in response to a request from

the Minister's office in relation to the plaintiff's application for a subclass 457 visa. The Department's intentions in relation to the plaintiff's employment were inextricably linked to that issue. This was because the Department had nominated the plaintiff and had been sponsoring his application, and the purpose of that nomination and sponsorship was directly related to his employment.

[112] It was also no doubt the case that the Departmental employees considered that the Minister had a vital interest in the information before he took the very significant step of seeking to intervene in support of the plaintiff in processes that were being conducted by the Australian Government. That intervention may have involved some direct representation to the responsible Commonwealth Minister.

[113] The statute goes on to provide a non-exclusive list of factors which a court may take into account in determining whether or not the conduct of the defendant in publishing matter about a person is reasonable in the circumstances. In the application of those factors, so far as they may be relevant to these purposes:

(a) for the reasons already given, the publication of the material was inextricably related to the Minister's performance of his public functions or activities;

(b) although serious, in relative terms the defamatory imputations contained in the Ministerial Briefing were rendered in language

which did not contain any gratuitous slur on the plaintiff's character;

(c) even allowing for the plaintiff's different perception of the relevant transactions, the material published was factual in nature rather than a recounting of mere suspicion and allegation;

(d) there can be no doubt that in the circumstances the publication of the material to the Minister in an expeditious fashion was in the public interest;

(e) the proper conduct of government business required a frank and timely response to the Minister's request for information and, in turn, to the plaintiff's request for intervention in his visa application process;

(f) the sources of the information for the defamatory imputations were reliable, and included the statement of reasons from the Refugee Review Tribunal and information within the direct knowledge of Departmental employees; and

(g) prior to publishing the defamatory imputations the relevant Departmental employees, and particularly Mr McHugh, Ms Cargill and Ms McDonald, had obtained and attempted to obtain information from the plaintiff in relation to his immigration

history and/or had spoken to him in relation to both his behaviours in the workplace and the complaints made by the contractor.

[114] In the application of those factors, and having regard to the findings of fact I have made, there is little or no difficulty concluding that the publication of the material was reasonable in the circumstances.

[115] While the focus on the application of the statutory defence is on the reasonableness of the publisher's conduct in publishing the material, the central requirement of the common law defence of qualified privilege is the demonstration of reciprocity of duty and interest between the publisher and those to whom the defamatory material was published.[16] Reciprocity will arise where the communication or category of communication in question requires protection for the "common convenience and welfare of society".[17]

[116] Those categories are not closed, and include the publication of material in the performance of a duty (including an employment duty) or to protect an interest; communications on government and political matters (subject to certain qualifications not relevant here); fair and accurate reports of judicial and parliamentary proceedings; and the publication of extracts from public registers which are, under statute,

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16 *Roberts v Bass* (2002) 212 CLR 1; [2002] HCA 57 at [62] per Gaudron, McHugh and Gummow JJ; *Bashford v Information Australia (Newsletters) Pty Ltd* (2004) 218 CLR 366 at [9].

17 *Lange v Australian Broadcasting Corp* (1997) 189 CLR 520 at [insert page numbers].

open for public inspection. It is the protection afforded to that first category of communication which is of relevance here.

[117] In order to attract protection, the material must have been published in the performance of a legal, social or moral duty, or to protect some interest of the publisher; and must have been published only to those who have a corresponding interest or duty to receive it.[18] In order to have the requisite interest or duty the recipient of the information must have a:

> … real and direct personal, trade, business or social concern about the information, or an interest such as would assist them in the making of an important decision or [the] determining [of] a particular course of action.[19]

[118] The requirement of reciprocity will be satisfied where publisher and recipient have mutual work or business concerns or activities. That mutuality of interest may, and ordinarily will, subsist in relationships between senior public servants and their responsible Minister is apparent in the result in *Jackson v Magrath*,[20] even allowing for the fact that the members of the court were divided as to whether the communication in question was protected by absolute or qualified privilege.

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18 *Adam v Ward* [1917] AC 309 at 344 per Lord Atkinson at 334; *Horrocks v Lowe* [1975] AC 135 at 149 per Lord Diplock.

19 *Bruton v Estate Agents Licensing Authority* [1996] 2 VR 274 at 292–6.

20 (1947) 75 CLR 293.

[119] Even where reciprocity is established, however, the publication in question must be relevant to the mutual interest subsisting in that relationship. For the reasons are ready given in the context of the statutory defence, the publication of the material in this case was clearly made in the performance of the employees' duty, and the Minister clearly had a corresponding interest or duty in the receipt of that material.

[120] Both the statutory defence and the defence of qualified privilege common law will be defeated if the publication in question was actuated by malice. The relevant question for that purpose is whether the publication in question was actuated by some extraneous motive. As the High Court observed in *Roberts v Bass*:

> An occasion of qualified privilege must not be used for a purpose or motive foreign to the duty or interest that protects the making of the statement. A purpose or motive that is foreign to the occasion and actuates the making of the statement is called express malice. The term "express malice" is used in contrast to presumed or implied malice that at common law arises on proof of a false and defamatory statement. Proof of express malice destroys qualified privilege. Accordingly, for the purpose of that privilege, express malice ("malice") is any improper motive or purpose that induces the defendant to use the occasion of qualified privilege to defame the plaintiff.[21]

[121] As the reasons go on to observe, however, "mere proof of the defendant's ill-will, prejudice, bias, recklessness, lack of belief in truth or improper motive is not sufficient to establish malice. The evidence

21 *Roberts v Bass* (2002) 212 CLR 1 at [75].

or the publication must also show some ground for concluding that the ill-will, lack of belief in the truth of the publication, recklessness, bias, prejudice or other motive existed on the privileged occasion and actuated the publication …That is because qualified privilege is, and can only be, destroyed by the existence of an improper motive that actuates the publication."[22]

[122] The relevant question for that purpose is whether the Departmental employees acted as they did from a desire to discharge their duty.[23] There is a presumption that the Departmental employees used the occasion for a proper purpose, and a corresponding onus on the plaintiff to prove that the defendant's servants or agents acted dishonestly by not using the occasion for its proper purpose.[24] In discharging that onus, it is not sufficient for the plaintiff to point to carelessness of expression, even if such carelessness could be said to be present in the subject communication, as the basis for inferring malice.[25]

[123] Against that background, and having regard to the factual findings I have made, the plaintiff has failed to demonstrate that the publication

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22 *Roberts v Bass* (2002) 212 CLR 1 at [76].

23 *Roberts v Bass* (2002) 212 CLR 1 at [79].

24 *Roberts v Bass* (2002) 212 CLR 1 at [96]-[97].

25 *Roberts v Bass* (2002) 212 CLR 1 at [103]-[104].

of the defamatory imputations was actuated by malice. Moreover, I make a positive finding that it was not.

Disposition

[124] The Minister had a legitimate interest in information concerning the work and conduct of the plaintiff, the Departmental employees who prepared the Ministerial Briefing genuinely believed that to be the case, and the publication was reasonably made in that belief. It follows that the publication was also made for a purpose or motive which was concomitant with the duty or interest protecting it. Accordingly, the publication of the defamatory imputations attracted protection from liability under both s 27 of the *Defamation Act* and the defence of qualified privilege at general law.

[125] That being the finding, it is unnecessary to make any determination in relation to the other defences pleaded or the question of damages.

[126] The plaintiff's action is dismissed, judgment is entered in favour of the defendant, and I will hear the parties in relation to costs.
